

STATE OF MICHIGAN
COURT OF APPEALS

STEINKE & ASSOCIATES, INC.,

Plaintiff-Appellee,

v

LOUDON STEEL, INC.,

Defendant-Appellant.

UNPUBLISHED

March 16, 2006

No. 263362

Oakland Circuit Court

LC No. 04-057197-CK

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right an order of the trial court granting summary disposition, double damages, and attorney fees to plaintiff. This case involves plaintiff's claim of commissions that it alleges defendant owes for violating the Sales Representative Commissions Act ("SRCA"), MCL 600.2961, for sales to Ford Motor Company. We reverse and remand for entry of an order granting summary disposition to defendant.

I. Facts

Plaintiff Steinke & Associates (plaintiff) is a sales representative corporation operated by Phil and Kurt Steinke. Defendant Loudon Steel, Inc. (defendant) is a corporation that manufactures metal products, and is operated by Gregg and Gary Loudon. In approximately 1999, plaintiff entered into a verbal agreement with defendant to serve as its sales representative. The oral agreement provided that defendant would pay plaintiff a two percent commission on all orders from General Motors (an existing customer of Loudon), and a three percent commission on any other orders. Plaintiff's primary function as sales representative was to maintain contacts with engineering staff at automotive companies, attempt to acquire bid opportunities, and perform follow-up work once Loudon obtained a bid.

By October 2002, the parties' relationship had eroded. In an October 17, 2002 letter to defendant, Kurt Steinke wrote that plaintiff had "decided to pursue other opportunities which will no longer allow us to represent Loudon Steel." More importantly for purposes of this appeal, the letter indicated that as to any outstanding commissions, plaintiff's "only expectation is that we will be paid commissions on the jobs that have been awarded to Loudon to date." The letter listed two contracts with Ford Motor Company that fell within that criteria.

In conformity with plaintiff's request, defendant paid plaintiff a \$25,000 commission for the two Ford purchase orders that had been awarded to Loudon before October 17, 2002. Although defendant complied with plaintiff's request, and despite there being no oral agreement on post-termination commissions, plaintiff apparently became dissatisfied with defendant's payment. Accordingly, plaintiff brought suit against defendants seeking commissions for amended Ford purchase orders that were awarded to defendant after October 17, 2002.

Plaintiff eventually filed a motion for summary disposition, arguing that it was entitled to judgment as a matter of law. Specifically, plaintiff argued that defendant's liability for post-termination commissions was clear, and that the commission amount was also undisputed. Plaintiff attached to its brief purchase orders from Ford to Loudon. The first is dated September 30, 2002, has purchase order number B74 P002 892404, and is one of the purchase orders referenced in plaintiff's termination letter.¹ The second purchase order attached to the brief is dated August 30, 2002, has purchase order number B74 P002 892055, and is the second purchase order referenced in plaintiff's letter. Finally, plaintiff submitted two addendums to the August 30, 2002 purchase order. The first addendum is dated November 25, 2002, and it increases the quantity of racks ordered from 1,005 to 2,949 at the same price. The second addendum calls for an additional 55 racks, for a total of 3,004 at the same price. The total price of this last order was \$1,955,604.

In its response and cross-motion for summary disposition, defendant stressed that plaintiff as the agent terminated the agreement, and that the opportunity to bid, which plaintiff provided defendant, was not the procuring cause of the subsequent amended orders. Instead, it was defendant "performing quality work, promising to make the delivery date, and promising that it would hold its price" that generated the subsequent orders. Defendant contended that the additional orders were not all merely renewals that altered quantity, but rather, involved changes in specifications and the building of prototypes. Defendant underscored the fact that, after October 17, 2002, plaintiff did "absolutely no work."

The court entered its opinion on March 10, 2005. According to the court:

[a]fter careful review of the additional Ford purchase orders, deposition testimony and affidavits, this Court finds that the additional Ford sales are re-orders placed as a direct result of Plaintiff's efforts in procuring the original purchase orders. The Ford purchase orders placed after October 17, 2002 reference the original purchase order numbers for which Plaintiff's [sic] were paid commissions. Therefore, under Michigan law, Plaintiff is entitled to commissions on the ultimate total sales arising from the original Ford purchase orders because Plaintiff was the procuring cause of those sales.

The court stated that the parties would have to go to trial on the issue of damages. In its motion for entry of judgment, plaintiff requested double damages pursuant to MCL 600.2961(5)(b), plus

¹ Actually, plaintiff's letter referenced requisition numbers, not the general purchase order number.

reasonable attorney fees and costs under MCL 600.2961(6). Defendant objected, arguing that the court's order only authorized payment for reorders and precluded payment for "newly designed racks" after plaintiff terminated defendant as its principal. On the eve of trial, the parties agreed to actual damages of \$41,700, which is three percent of total sales less the \$25,000 defendant already paid. The parties left the issue of double damages and attorney fees for the court to decide in a final order based on the trial briefs; the parties also stipulated that plaintiff's attorney fees and costs were \$17,500.

The court awarded double damages in the amount of \$125,500 and attorney fees in the amount of \$17,500, for a total of \$142,600. Statutory interest of \$7,365.27 from the date of filing to the date of judgment made for a total judgment of \$149,965.27.

II. Analysis

This court reviews de novo a trial court's determination regarding a motion for summary disposition. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.1116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The court must consider all pleadings, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.* Neither party claimed that there was a genuine issue of material fact, as both parties sought summary disposition in their favor.

The parties also do not dispute that the definitional sections of MCL 600.2961, which include commission, principal, and sales representative, apply to this case. They do, however, dispute the manner in which the statute was applied to govern their relationship. Application of the SRCA to a particular case is a matter of statutory interpretation that is reviewed de novo. *Mahnick v Bell Co*, 256 Mich App 154, 161; 662 NW2d 830 (2003). According to the statute:

All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due. [MCL 600.2961(4).]

The statute's definition of sales representative indicates, that a commission is earned by the successful "solicitation of orders or sale of goods" MCL 600.2961(1)(e). Sales representatives are entitled to actual damages if a principal fails to comply with the above provision. MCL 600.2961(5)(a). The statute also states that it "does not affect the rights of a principal or sales representative that are otherwise provided by law." MCL 600.2961(9). However, because the oral agreement does not address post-termination commissions, Michigan law provides that plaintiff, as "the agent is entitled to recover [its] commission whether or not [it] has personally concluded and completed the sale, it being sufficient if [the agent's] efforts were the procuring cause of the sale." *Reed v Kurdziel*, 352 Mich 287, 294; 89 NW2d 479 (1958).

The SRCA only requires the payment of commissions that became “due” at the time of the sales representative’s termination. MCL 600.2961(4); *APJ Associates, Inc v North American Philips Corp*, 317 F3d 610, 616 (CA 6, 2003). Normally the terms of the contract govern this question, MCL 600.2961(2), but as noted the oral agreement only provides the amount of the commissions, and says nothing about payment post-termination. Thus, we turn to *Reed, supra*, which is the seminal case discussing the “procuring cause” doctrine.

In *Reed*, the plaintiff alleged that his principal terminated his services without paying him commission for past sales. The plaintiff prevailed in the trial court, and on appeal the defendant argued that the plaintiff should not have been awarded commissions on sales made to customers, previously serviced by the plaintiff, after the plaintiff was terminated. Quoting from 12 ALR 2d 1363, and citing to both Michigan and sister state decisions, the Court held that an agent is entitled to commissions, even if he did not personally complete the sale, if his efforts were the procuring cause of the sale:

It would appear that underlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent’s or broker’s services without compensation and imposing upon the principal, regardless of the type of agency or contract, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent. In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission *whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale*. *Reade v Haak*, 147 Mich 42[; 110 NW 130 (1907)]; *Case v Rudolph Wurlitzer Co*, 186 Mich 81[; 152 NW 977 (1915)]; *MacMillan v C & G Cooper Co*, 249 Mich 594[; 229 NW 593 (1930)]. In Michigan the rule goes further to provide *if the authority of the agent has been cancelled by the principal*, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. *Heaton v Edwards*, 90 Mich 500[; 51 NW 544 (1892)]; *McGovern v Bennett*, 146 Mich 558[; 109 NW 1055 (1906)]; *MacMillan v C & G Cooper Co, supra*. [*Id.* at 294-295 (emphasis added).]

As one court noted, “both the Michigan cases and the Restatement interpret the concept of ‘procuring cause’ quite narrowly.” *Roberts Associates, Inc v Blazer Int’l Corp*, 741 F Supp 650, 652-653 (ED Mich, 1990).

The purpose of applying the procuring case doctrine when the contract is silent was succinctly stated by the court in *Clark Bros Sales Co v Dana Corp*, 77 F Supp 2d 837, 849 (ED Mich, 1999):

As this great weight of subsequent case law uniformly confirms, *Reed* does not require that the parties’ express agreement as to the payment of commissions be supplanted by a “procuring cause” approach. Rather, *the “fair dealing” principle set forth in Reed applies only where the parties have not addressed the subject of post-termination commissions, and seeks to ensure that the manufacturer does not unfairly benefit from the opportunistic termination of a*

sales representative after he has procured a sale but before the sale is consummated. [Emphasis added.]

See, also, *Linsell v Applied Handling, Inc*, 266 Mich App 1, 14; 697 NW2d 913 (2005). Here, we are not dealing with the typical sales representative commission case, where a principal terminates a sales agent after the agent procures a sale but before the actual deal is solidified. Rather, the agent (plaintiff) initiated the termination, and requested payment of the two orders made up to the date of termination. That was done. Thus, the purpose of the doctrine - to ensure that a manufacturer does not unfairly benefit from an opportunistic termination - has no application in this case.

Additionally, and in somewhat the same vein, plaintiff was provided all the commissions that were “due” at the time of termination. By October 17, 2002, the two sales to Ford – represented by the two purchase orders – had been completed, and plaintiff had been paid the commissions due on the sale. Hence, what plaintiff “procured” – the two purchase orders – were paid. In other words, the *Reed* holding has no application here because the sale was completed by the time of the termination, a termination committed by plaintiff. *Reed, supra* at 294-295. Absent an agreement that provides for further compensation, plaintiffs were fully compensated for the work they procured. See *Roberts Assoc, supra* at 653-654.

The fact that additional work spawned from the original purchase order is of no import. That work was awarded after plaintiff terminated its relationship with defendant, and thus, plaintiff had performed no services in relation to that new work. *Roberts Assoc, supra* at 653. This result may have been different if the original purchase orders were “blanket” orders, but plaintiff admitted that they were not. Or, as noted, plaintiff could have sought to obtain a written contract from defendant spelling out that post-termination commissions on work finalized before termination would be payable, but there is no such agreement.

Because plaintiff was not a prevailing party under the SRCA, it was not entitled to attorney fees and court costs.

Reversed and remanded for entry of an order granting defendant’s motion for summary disposition. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Mark J. Cavanagh

/s/ Henry William Saad